SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 944

INTER-OCEAN CASUALTY COMPANY,

Petitioner,

vs.

BESSIE BROCKMAN.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorables, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Opinions Below.

The judgment of the District Court is shown in the record at page 17, but that court did not write an opinion. The opinion of the Circuit Court of Appeals is reported in 23 F. (2), page 1006.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on the first day of December, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as mentioned by the Act of February 13, 1925 (Section 347 U. S. C. A.).

Statement of the Case.

In the petition for the writ there is set out a statement of the case, and it is deemed not required to repeat that statement here. We assume the court will make needed reference thereto. There will be added in this brief, in appropriate places, such additional material matters as are necessary for a proper consideration of the questions presented, with appropriate page references to the printed record.

Specifications of Error.

The following specified errors are intended to be urged herein. They are a part of the errors specified in petition for rehearing in the Circuit Court of Appeals (R. 151-161).

I.

The Circuit Court of Appeals erred in holding that accidental bodily injury is sufficiently proved by evidence only of injury, and that it is unnecessary to prove the existence of something unforeseen, unexpected and unusual which accompanied the voluntary act and produced the injury.

II.

The Circuit Court of Appeals erred in holding that there was evidence that appellee sustained a rupture of her lumbosacral disc.

III.

The Circuit Court of Appeals erred in failing to hold that the charge of the trial court, on the issue of accidental bodily injury, was erroneous in that it failed to include an instruction to the jury, in substance at least, that if the injury followed in a usual or reasonably to be expected way, from the means voluntarily employed, that is, the given voluntary act, it is not a result accidentally effected.

IV.

The Circuit Court of Appeals erred in holding that the charge to the jury on the issue of accidental bodily injury, as follows:

> "I charge you that accidental injury is an unintended result of an intended act. In order to make it applicable to this particular contention here, that is, she claims that she was assisting in the removal of a patient from the carriage to the patient's bed, and while in that act, that she hurt her back. You see, she intended to move the patient, she did not intend to have it hurt her back. That is an intended act accompanied by an unintended result",

is a sufficient charge and instruction on the issue, and that it was unnecessary to further charge that "if the injury followed in a usual or reasonably to be expected way, from the means voluntarily employed, that is, the given voluntary act, it is not a result accidently effected."

V.

The Circuit Court of Appeals erred in holding, on p. 3 in its opinion, that appellee had complied with the policy terms requiring her to furnish proofs of loss.

VI.

The Circuit Court of Appeals erred in its holding that appellant waived proofs of loss.

VII.

The Circuit Court of Appeals erred in holding that appellee, without furnishing appellant proofs of loss for periods subsequent to May 16, 1939, is entitled to recover indemnity for such periods.

VIII.

The Circuit Court of Appeals erred in failing to hold, as a matter of law, that appellant was entitled, under the terms of the policy, to proofs of loss each thirty days during which liability might continue, and that since appellee failed to furnish such proofs of loss she would not be entitled to recover for the periods for which no proofs were made.

ARGUMENT.

On First Question Presented.

The policy clause insuring against disability from injury limits the risk to accidental bodily injury (R. 9, 22). Respondent alleged she sustained accidental bodily injury from the lifting of a patient in a hospital (R. 2). The issue thus raised is that there was something accidental in the act of lifting. The only evidence offered on the issue was the testimony of respondent, which was that she lifted an anaesthetic patient and had a severe pain in her back, which ran down into her leg, and that she had difficulty straightening up (R. 55), and that the patient was too large for them to lift (R. 70), and that she had heard of others getting their backs hurt (R. 63).

The contention of petitioner is that the evidence does not show accidental injury, and that proof of injury alone is not sufficient to show accident; that it is necessary to show something unusual, unforeseen and unexpected accompanied the act of lifting and produced the injury,—that the injury followed in an unusual and not to be expected way, and therefore was not the natural and probable consequence of the act.

The act of lifting, as such, is a normal and ordinary physical activity. The evidence does not show anything unusual, unforeseen and unexpected in the act of lifting

the patient. If the patient was too large for them to lift, as she testified, she was forewarned of a probable and reasonably to be expected injury from the act.

The policy does not insure against all injury, but only against accidental injury. To say that proof of injury alone is sufficient to show it was accidental, is to eliminate from the policy provision the word that limits the risk assumed. The word "accidental" was intended to describe an injury that is not the usual and reasonably to be expected result of a voluntary act,—an injury where there is something unusual, unforeseen and unexpected in connection with the voluntary act that produces an unnatural and improbable consequence of the act.

We believe the weight of authority supports the contention of petitioner herein for the requirements of proof of accident and of accidental injury.

Mutual Accident Assn. v. *Barry,* 131 U. S. 100;

Bryant v. *Continental Casualty Company,* 182 S. W. (1) 673; and

International Travelers Association v. *Francis,* 23 S. W. (2) 282.

In the case last cited the court defines "accident" and "accidental" as follows:

> "An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds".

The cases of *Aetna Life Insurance Company* v. *Portland Gas & Coke Company,* 229 F. (1) 552, Ninth Circuit, and *New York Life Insurance Company* v. *Ollich,* 42 F. (2) 399, Sixth Circuit, support the contention of petitioner as hereinabove stated.

Respondent offered no evidence of anything unforeseen, unexpected and unusual accompanying her act and producing injury, or that the injury followed in an unusual and not to be expected way and was not the natural and probable consequence of her act. Nothing was shown that could possibly have produced the alleged injury, unless it was the largeness of the patient. But she foresaw this condition and must be held to have comprehended, and to have reasonably expected that the natural and probable consequence of her act would be injury. Under the rule quoted above, respondent did not prove accidental injury.

To hold that proof of injury alone is sufficient to show that it was an accident, will remove the burden of proof on a claimant to show that his injury was accidental, and will place upon the insurer the burden of showing that the injury was not accidental. It will remove from the policy contract the special word placed there for the purpose of limiting the risk so as not to include general injuries not having the elements of accident in connection with them.

On Second Question Presented.

The second question presented is based upon the absence of any positive evidence of a ruptured disc and the absence of any evidence to support a legal presumption of rupture. Respondent did not testify there was a rupture, as is disclosed by referred to portions of her testimony hereinabove. Neither of her medical experts testified positively there was a rupture; in fact, Dr. Williams testified he did not know what the condition of the disc was (R. 39), and Dr. Thomasson stated he did not know whether there was a rupture (R. 53). Each of the doctors based a diagnosis of rupture on symptoms only, which symptoms were also indicative of diseased conditions (R. 39-53). Each of the doctors testified that the disc was so tough that it would require

tremendous pressure to cause a rupture (R. 36-52), but neither of them testified as to how much weight lifted would be necessary to rupture a disc, and there is no evidence of what that weight would be and no evidence of what was the weight lifted by respondent on the occasion in question. On the other hand, there was positive and direct evidence that in lifting a patient from a carriage to a bed four persons participated in such way as to at least equalize the weight lifted, and in such manner that no stooping or unusual posture would be required in the act of lifting (R. 120-122).

The evidence was insufficient to do more than create a surmise or supposition of rupture. That is not enough to support the verdict and judgment.

Altmayer v. *Travelers Protective Ass'n. of America*, 119 F. (2) 1005, 7th Circuit.

On Third Question Presented.

The question here presented is in regard to the court's charge to the jury on the issue of accidental bodily injury. The charge was that accidental injury is an unintended result of an intended act (R. 134). Respondent excepted to this charge and requested that the jury be charged, in substance at least, that if the injury followed in a usual or reasonably to be expected way from the means voluntarily employed, that is, the given voluntary act, it is not a result accidentally effected (R. 138). The respondent had testified that the patient she lifted was too large to lift (R. 70), and that she had heard of other people getting their backs hurt (R. 63).

The court's charge limited the definition of injury to an unintended result of a voluntary act. That definition and instruction is too restricted, and is inconsistent with the definition of accidental injury as determined by the Supreme Court of Texas in the case of *International Travel-*

ers Association v. *Francis*, 23 S. W. (2) 282. Petitioner's requested charge was in thorough accord with the holding in the *Francis* case, and in the case of *Bryant* v. *Continental Casualty Company*, hereinbefore cited. The court's charge amounted practically to an instruction for the jury to find for respondent, because the charge failed to call to the jury's attention, as a part of the definition of accident or accidental injury, that there must be something unusual, unforeseen and unexpected in connection with the voluntary act, and that if the injury was a natural and probable consequence of the voluntary act it would not be an accident nor accidental. The respondent having testified that the patient was too large for them to lift, and that she had heard of others getting their backs hurt, gave ample support to the request of petitioner that the jury be charged as indicated by petitioner, for from such evidence the jury would have been entitled to have inferred and found that the claimed injury was the natural and probable consequence of a voluntary act, and that there was nothing unusual, unforeseen and unexpected in connection with the act of lifting and therefore that the injury was not accidental.

The trial court's definition of accidental injury, limited as it is, to whether the claimant intended to be injured, fails altogether to recognize the elements of accident that must exist before there is accidental injury, and it removes from the claimant the burden of proving the facts necessary to constitute accidental injury, and places upon the insurer the burden of showing there was no accident. The charge is such as to permit a claimant to establish his case by simply testifying that he was hurt and that he did not intend to be hurt. Claimant's "intention" could hardly be disproved, for it is a condition which can be determined only by the claimant's mental attitude, and claimant alone is in possession of that fact.

The charge requested by petitioner was proper and necessary for the protection of its legal rights, and the court's failure to give the charge deprived petitioner of a fair and just trial before the jury.

On the Fourth Question Presented.

The fourth question presented is whether under the facts in this cause the insurer repudiated the contract. The policy sued on afforded coverage for disability from accidental bodily injury or illness. The indemnity provided was $100.00 monthly for total and continuous disability on account of accidental injury (R. 9), subject to affirmative and due proofs of loss to be filed within 90 days (or the minimum time required by law) after termination of the period for which insurer should be liable (R. 10). The policy made the furnishing by insured of proofs of loss a condition precedent to the right of recovery under the policy (R. 10), and provided that no waiver of the terms of the policy should be valid unless made by an executive officer of the company and endorsed in writing on the policy (R. 10).

Petitioner furnished respondent with forms for making proofs of loss on account of accident disability, and illness disability, as disclosed by correspondence from petitioner to respondent (R. 79, 82, 84, 86, 90, 94). The facts in connection with the furnishing of proofs of loss forms by petitioner to respondent and the action of respondent in regard to such proofs of loss forms, and as to the attitude and efforts of petitioner in regard to its liability under the policy contract, are shown by the letters written by petitioner to the respondent, hereinabove referred to, and all the facts are set out in Question Number 4 in the petition for writ of certiorari, to all of which the court is respectfully referred, to avoid repetition here. Do the facts constitute a repudiation of the contract?

The facts show, at most, only a controversy between petitioner and respondent as to whether proofs of loss and payment of indemnity should be made on account of accident disability or illness disability. There was never a denial of liability, and no refusal to pay. The correspondence between respondent and petitioner clearly shows that petitioner sought to obtain proofs of loss for either accident or illness disability, and expressed a willingness to make payment of indemnity upon completion of proof. When respondent refused to furnish illness disability proofs, petitioner furnished another accident disability proof form, again offering to pay indemnity, and requested completion of proof. The facts show that petitioner was attempting to determine the matter of what sort of liability it had on the contract. The controversy with respondent was only an attempt to settle divergent views. Petitioner did not assume the position that it did not owe indemnity under the contract, but only asserted that as it understood the facts its liability was under the illness clauses instead of the accident clauses of the policy.

Not only was there no repudiation of the contract by petitioner, but there was not even a partial breach, for petitioner recognized that possibly it owed respondent some indemnity and offered to pay it upon proof of disability. There is no repudiation of a contract unless there is a definite and unqualified denial of all liability and refusal to perform. As long as there is recognition of some obligation under a contract, there is no repudiation.

In *New York Life Insurance Company* v. *Viglas,* 297 U. S. 672, Viglas made claim against the company for indemnity on account of total and permanent disability, and after the company had recognized its liability for payment and had made payment for several months, it concluded the

disability had ceased and refused to make further payments. Thereafter it declared the policy lapsed. In his suit Viglas alleged the facts above stated and claimed they constituted a repudiation of the entire contract, relieving him of any further obligation. In disposing of the case this Court held:

> "Upon the showing made in the complaint there was neither a repudiation of the policy nor such a breach of its provisions as to make conditional and future benefits the measure of recovery. Repudiation there was not, as the term is known to the law. Petitioner did not disclaim the intention or the duty to shape its conduct in accordance with the provisions of the contract. Far from repudiating those provisions, it appealed to their authority and endeavored to apply them. * * * There is nothing to show that the insurer was not acting in good faith in giving notice of its contention that the disability was over. If it made a mistake there was a breach of a provision of the policy with liability for any damages appropriate thereto. We do not pause at the moment to fix the proper measure. Enough in this connection that at that stage of the transaction there had been no renunciation or abandonment of the contract as a whole."

In *Mobley* v. *New York Life Insurance Company*, 74 F. (2) 588, Fifth Circuit, the Court held:

> "In order to constitute an anticipatory breach of the entire contract there must be a clear and unequivocal repudiation by the promisor of all that remains to be performed, a refusal to be further bound by the contract * * * All that happened was that the company misjudged its obligations. Such an error made in good faith, whether founded in mistake of law or fact, is not repudiation, and does not end a continuing contract, but calls only for its enforcement according to its terms."

In *Kimel* v. *Missouri State Life Insurance Company,* 71 F. (2) 921, Tenth Circuit, the court held in effect that a promisor's renunciation must be clear and unequivocal, and refusal to perform must be of whole contract.

In *Universal Life & Accident Insurance Company* v. *Sanders,* 102 S. W. (2) 405, the Supreme Court of Texas held:

> "It is not to be understood that we are extending the doctrine of anticipatory breach so as to make it applicable to cases where the insurer merely denies liability or claims defenses under the terms of the policy. The Pollack opinions limit its application to cases in which the obligor absolutely repudiates the obligation without just excuse."

In *Provident Savings Life Assurance Society* v. *Ellinger,* 164 S. W. (1) 1024, the Texas Court of Civil Appeals at Austin held:

> "When an anticipatory breach of a contract is intended to be shown by the declaration of the party that he will not perform the same, such declaration must be in positive and unconditional terms."

In *Senter* v. *Dixie Motor Coach Corporation,* 67 S. W. (2) 345, the Texas Court of Civil Appeals at Dallas, held:

> "The positive refusal to perform a contract is certainly a breach of it, but the mere assertion of a party that he will not perform an executory contract is not in itself sufficient to constitute a breach, nor will a controversy over the terms of a contract and the extent of damage to the subject matter, or the construction to be placed upon them, be deemed such a renunciation or abandonment as will authorize the other party to treat the contract as breached."

The facts in the case at bar, we submit, clearly show there was no repudiation of the contract and no breach of

any of its provisions by the insurer, and we further submit that the authorities next above quoted support petitioner's contention that it did not repudiate or breach the contract.

On the Fifth Question Presented.

This question is in regard to whether recovery could be had for the monthly periods from May 16, 1939, to December 30, 1940. If there was no repudiation of the contract by petitioner, as we think we have demonstrated under the fourth question, then under the terms and conditions of the policy respondent was duty bound to furnish to petitioner proofs of continued disability, for the periods May 16, 1939, to December 30, 1940, which proofs were a condition precedent to liability under the policy; and since she failed to furnish such proofs, she would have no right or cause of action for indemnity for those periods and no recovery could be had therefor. If, however, it should be held that there was a repudiation by petitioner of the contract, then respondent's rights and remedies are to be determined by her election and treatment of the contract, and the rights given her under the law.

If the contract was repudiated by petitioner, respondent had the right to treat the contract as ended at the time of its repudiation and then sue for damages for the breach thereof, or, should she choose to do so, she might treat the contract as not ended but continuing in force and effect, and require performance. Had she treated the contract as ended, her claim for damages for the breach could have been presented, but the damages would have been limited as of time of breach. Under the contract in question her damages would have been the amount of indemnity payable for the past and current periods of proven disability. No damage could have been claimed for future monthly periods,

because the claimed disability was not permanent but temporary, and there could have been no definite ascertainment of future periods of disability and amount of indemnity except on the basis of speculation and supposition.

It appears that respondent contends the contract was repudiated, but treats it not as ended but as continuing. She thus elected to treat the contract as if there had been no repudiation. This attitude of respondent and treatment of the contract continued the burdens and duties, if any, upon petitioner to perform its part of the contract according to the terms and conditions thereof, and continued the burdens and duties upon respondent to perform her duties and obligations under the contract according to its terms and conditions.

In the case of *Greenwell Theatrical Circuit* v. *Markowitz*, 79 S. W. (1) 1069 (loc. p. 1071), the Supreme Court of Texas held:

> "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

The case of *Wellington Railroad Committee* v. *Crawford*, 216 S. W. (1) 151, by the Texas Supreme Court, is to the same effect as the *Markowitz* case.

Under the terms and conditions of the policy respondent was definitely obligated to furnish affirmative and due

proofs of loss, as a condition precedent to liability of petitioner, and for recovery of indemnity (R. 10, 22). The policy provided that the indemnity should accrue and be payable monthly (R. 9, 10), and respondent demanded monthly payments (R. 78, 89). Proofs of disability under the policy provisions were required to be furnished not later than 90 days (or the minimum period provided by law) from the termination of the period of liability.

Since respondent elected to treat the contract as continuing in force and effect, she had the duty of complying with its terms and conditions, and to furnish proofs of disability as above stated. In *Metropolitan Life Insurance Company* v. *Wann,* 109 S. W. (2) 470, the Supreme Court of Texas held:

> "By the terms of the policy, the filing of proof showing that the insured was totally and permanently disabled was a condition precedent to recovery. When a policy contains such provision, and the proof fails to establish that the insured has complied therewith, no right of recovery is shown."

She did not allege that she had furnished such proofs for the periods subsequent to May 16, 1939, and no evidence was offered by her to show that such proofs had been tendered. There was therefore a failure on her part to comply with the terms and conditions of the policy.

Southern Surety Company v. *Aronson,* 5 S. W. (2) 629; By Court of Civil Appeals of Texas, at Galveston;

State Life Insurance Company of Indianapolis, Ind. v. *Parks,* 89 S. W. (2) 289; By Court of Civil Appeals of Texas, at Amarillo.

Respondent attempts to justify her failure to comply with the terms and conditions of the contract by alleging

that petitioner waived such compliance. But there was no evidence of any waiver of proofs of loss for any period. All the correspondence from petitioner to respondent insisted upon compliance with the terms and conditions of the policy, and shows an endeavor on the part of petitioner to obtain from respondent proofs of loss. Respondent endeavors to show from such correspondence a waiver of proofs of loss; but even if such correspondence showed a waiver it would be applicable solely to past periods or the current period of disability, and under no circumstances could apply to conditional future periods, for the reason that the claimed injury and disability of respondent was not alleged nor shown to be permanent, but only temporary, and the conditions in periods subsequent to May 16, 1939, were not determined, and remained uncertain and unknown at the time of the alleged waiver. A waiver exists only where there is a present known right which can be waived.

Garvey v. *Blatchford Calf Meal Co.*, 119 F. (2) 973, 7th Circuit.

The matter of disability and its degree, for future periods, was not determined nor definitely ascertainable at the time of the claimed waiver. Certainly, petitioner did not know what the disability and its degree, if any, would be in the future. Unless disability should continue to be total there would be no liability after twelve months from date of injury, for the policy so provides (R. 9). There was no duty under the policy for respondent to furnish proofs of disability prior to the period for which proof should be made, nor did petitioner have any right to require the filing of a proof of disability for future periods. Therefore, there was no right that could be waived, and there could have been no waiver on May 16, 1939, or prior thereto, of proofs of disability for future periods.

Conclusion.

We submit that this case calls for the exercise by this Court of its supervisory power by granting a Writ of Certiorari for review, and revision of the judgment of the Circuit Court of Appeals.

Respectfully submitted,

HARRY SCHERR,
First Huntington National Bank Bldg.,
Huntington, West Virginia;
and
GEO. K. HOLLAND,
1612 Kirby Building,
Dallas, Texas,
Of Counsel for Petitioner.

(8684)